**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Petition to Establish Procedural Requirements | ) | |
| To Govern Proceedings for Forbearance | ) | WC Docket No. 07-267 |
| Under Section 10 of the Communications | ) | |
| Act of 1934, as Amended | ) | |

# REPLY COMMENTS OF COVAD COMMUNICATIONS GROUP, NUVOX COMMUNICATIONS, AND XO COMMUNICATIONS, LLC

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# Reply Comments of Covad Communications Group, NuVox Communications, and XO Communications, LLC

Covad Communications Group, NuVox Communications, and XO Communications, LLC (hereinafter referred to as "Joint Commenters"), by their attorneys, hereby submit their reply comments in response to the Commission Notice of Proposed Rulemaking ("NPRM" or "Notice") in the above-captioned proceeding.

## I. INTRODUCTION AND SUMMARY

The record shows a pressing need for the Commission to formalize its forbearance process through the adoption of uniform procedures that apply to all parties to a forbearance proceeding. Only through adoption of such procedural rules can the Commission ensure that it acts in the public interest by giving thoughtful and timely consideration to the competitive and public interest issues at the heart of the Section 10 forbearance process.

The majority of commenters urge the Commission to abandon its *ad-hoc* approach to forbearance proceedings and to provide clear direction to all interested parties as to the conduct of forbearance dockets. Numerous commenters note their strong support for a adoption of a complete-as-filed rule, the application of Administrative Procedure Act ("Act") notice-and-comment requirements, and Commission clarification that a petitioning party carries

the burden of proof. At the same time, these parties express frustration regarding how to adequately analyze and respond to forbearance petitions in the current rule-free environment. Even some of the most aggressive proponents of the forbearance process as a means to achieve deregulation acknowledge the need for the Commission to institute certain procedural standards.

Given the likelihood that pending and future forbearance petitions will have a significant impact on telecommunications policy and could affect the fate of major segments of the industry, the Commission should institute all procedural rules in its NPRM (as supplemented and amended in these reply comments) to guide its consideration of such sweeping requests for regulatory relief.

## II. THERE IS OVERWHELMING SUPPORT FOR THE ADOPTION OF RULES TO APPLY ORDER TO THE FORBEARANCE PROCESS

The statutory language of Section 10 is silent on process and fails to address the procedural framework that is required to carefully and fully consider forbearance cases. It is this shortcoming that the Commission's NPRM rightfully seeks to address. The record in this proceeding demonstrates the pressing need for the Commission to cure this deficiency and to facilitate its forbearance process through the adoption of uniform procedures that apply to all interested parties. As numerous commenters note, only through adoption of such procedures can the Commission ensure that it provides thoughtful and timely consideration to the competitive and public interest issues at the heart of forbearance proceedings.[1]

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[1] *See, e.g.,* Comments of Mercatus Center, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*Mercatus Center Comments*"), at 3; Comments of AdHoc Telecommunications Users Committee, WC Docket No. 07-267 (filed Mar. 7, 2008), at 1; Comments of the California Public Utilities Commission and the People of the State of California, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*CPUC Comments*"), at 4; Comments of the Missouri Public Service Commission, WC Docket No. 07-267 (filed Mar. 7, 2008), at 2; Joint Comments of New Jersey Division of Rate Counsel and National Association of State Utility Consumer Advocates, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*NASUCA Comments*"), at 9.

The majority of commenters urge the Commission to abandon its current *ad-hoc* approach to forbearance proceedings and to embrace the procedures detailed in the Petition for Procedural Rules[2] as supplemented in these reply comments. The Commission received 30 sets of comments representing more than 60 diverse parties, including competitive local exchange carriers ("CLECs"), interexchange carriers ("IXCs"), incumbent local exchange carriers ("ILECs"), cable companies, Internet service providers ("ISPs"), state commissions, trade associations, academic institutions and thinks tanks. As discussed below, most of those commenters enthusiastically support, in whole or in part, the Commission's adoption of a detailed set of principles to guide its conduct of forbearance proceedings.

### A. The Record Demonstrates A Common Desire for the Commission to Apply Uniform Procedures To Forbearance Petitions

Procedural rules are critical now that the forbearance process is being invoked routinely by petitioners as a way to resolve far-reaching policy questions central to the purposes and objectives of the Communications Act of 1934, as amended ("Act").[3] Earthlink Inc. and its subsidiary New Edge Networks agree. They rightly note that forbearance proceedings "often have a significant and lasting impact on competition in the telecommunications market. But unlike other types of FCC proceedings, they are characterized by a striking lack of procedural requirements and safeguards."[4] The City of Philadelphia also endorses swift adoption of forbearance rules so that the Commission may "reassert control over its own regulatory agenda

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2 *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267 (filed Sept. 19, 2007) ("*Rules Petition*").

3 Comments of Covad Communications Group, Nuvox Communications, and XO Communications, LLC, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*Joint Comments*"), at 3.

4 Joint Comments of Earthlink Inc. and New Edge Networks, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*Earthlink Comments*"), at 6.

and ... promote the public interest intended to be preserved by the forbearance provisions of the Communications Act."[5] As noted by TEXALTEL, a set of procedural rules would lead to "orderly and constructive proceeding[s] tailored to support the due process rights of all participants."[6] The New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates confirm that the vagaries of Section 10 and the sweeping regulatory relief that often results from forbearance proceedings require the "clarity and reason" that only rules of process can provide.[7]

The record is replete with evidence of the fundamental flaws in the Commission's current unstructured approach to forbearance petitions. In recent years, Time Warner observes, the lack of proper administrative rules governing the forbearance process has permitted parties to submit petitions lacking in sufficient factual or legal support, allowed petitioners to withdraw or narrow the scope of petitions at any time, and allowed petitioners to bypass the most rudimentary substantive analytical standards, including properly defining product and geographic markets.[8] COMPTEL adds that the unstructured nature of the forbearance process often leads to "unfortunate" results; *i.e.*, petitioners withholding critical empirical evidence until well after the formal comment cycle on their petition has closed and material evidence being produced within a

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5 Comments of City of Philadelphia, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*City of Philadelphia Comments*"), at 1.

6 Comments of TEXALTEL, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*TEXALTEL Comments*"), at 7.

7 *NASUCA Comments*, at 29.

8 Joint Comments of Time Warner Telecom Inc., One Communications Corp., and CBeyond Inc., WC Docket No. 07-267 (filed Mar. 7, 2008) ("*Time Warner Comments*"), at 2.

month of the statutory deadline, leaving affected parties insufficient time to evaluate and respond to the new data.[9]

The record reflects support for many of the specific rules proposed in the NPRM. For example, nearly a dozen commenters endorse the need for the Commission to formally apply APA notice-and-comment rules to forbearance petitions.[10] NARUC cites Commission precedent in applying similar rules to Bell Operating Company ("BOC") Section 271 interLATA entry applications where all interested parties were thereby afforded a "fair opportunity" to comment on the subject petition.[11] Several commenters detail prior forbearance proceedings fraught with petitioners' untimely filings of critical empirical evidence as support for adoption of a complete-as-filed rule.[12] Earthlink highlights the *Verizon 6-MSA Proceeding*[13] as a "powerful example of

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9 Comments of COMPTEL, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*COMPTEL Comments*"), at 4 (citing *Petition of Qwest for Forbearance Pursuant to 47 U.S.C. 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, FCC 05-170, n. 167 and 171 (2005)).

10 Comments of Access Point, *et al.*, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*Access Point Comments*"), at 14, 15; Comments of the National Association of Telecommunications Officers and Advisors, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*NATOA Comments*"), at 5; U.S. Small Business Administration, WC Docket No. 07-267 (filed Mar. 7, 2008) *("SBA Comments*"), at 5; *COMPTEL Comments*, at 5; *City of Philadelphia Comments*, at 7; *NASUCA Comments*, at 9; *CPUC Comments*, at 5; *Mercatus Center Comments*, at 4; Comments of Sprint Nextel Corp., WC Docket No. 07-267 (filed Mar. 7, 2008) ("Sprint *Nextel Comments*"), at 5; Comments of the Telecom Investors, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*Telecom Investors Comments*"), at 3.

11 Comments of the National Association of Regulatory Utility Commissioners, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*NARUC Comments*"), at 4. *See, e.g., Application for Verizon Virginia Inc., Verizon Long Distance Virginia, Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc. for Authorization to Provide In-Region InterLATA Services in Virginia*, Memorandum Opinion and Order, 17 FCC Rcd 21880, 21925, ¶ 78 (2002) ("*Verizon Virginia Section 271 Order*").

12 *See, e.g.,* Comments of the National Cable Telecommunications Association, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*NCTA Comments*"), at 9, 10; *NARUC Comments*, at 5; *City of Philadelphia Comments,* at 8-9; *Mercatus Center Comments*, at 5-6; *TEXALTEL Comments*, at 8; *Earthlink Comments*, at 13-14; *COMPTEL Comments*, at 8; Comments of the Pennsylvania Public Utility Commission, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*PA PUC Comments*"), at 12; *Access Point Comments*, at 17; *NATOA Comments*, at 6.

how gamesmanship and inadequate evidence can unnecessarily expend Commission resources and impede its ability to protect the public interest unless proper procedures are in place."[14] And COMPTEL notes that the Commission itself has recognized that a constantly evolving record is "highly disruptive."[15]

The record also demonstrates strong support for Commission procedures encouraging state input.[16] Many commenters ask the Commission to adopt a rule specifically seeking state input and granting states complete access to Confidential and Highly Confidential Information. Some commenters go a step further, urging the Commission to adopt rules requiring the petitioner to notify state commissions of its forbearance request,[17] while others encourage the Commission to require states to submit comments at the same time as other interested parties.[18]

Some of the most aggressive proponents of the forbearance process as a means to achieve deregulation themselves acknowledge the need for the Commission to institute certain procedural standards. Notably, AT&T has "no objection" to rules proposed in the NPRM that would: (1) require a petitioner to explain why the requested relief satisfies each of the three forbearance criteria set forth in Section 10; (2) preclude parties from making *ex parte*

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13 *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, WC Docket No. 01-172 (rel. Dec. 5, 2007) ("*Verizon 6-MSA Order*"), appeal pending, *Verizon v. FCC*, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008).

14 *Earthlink Comments*, at 6.

15 *COMPTEL Comments*, at 8.

16 *See, e.g., SBA Comments*, at 10-11; Comments of the Public Utility Commission of Texas, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*Texas PUC Comments*"), at 3-4; *CPUC Comments*, at 8; *Missouri PSC Comments*, at 7-8; *PA PUC Comments*, at 13-15; *NARUC Comments*, at 6, *NASUCA Comments*, at 20; *COMPTEL Comments*, at 9-10.

17 *Texas PUC Comments*, at 2.

18 *CPUC Comments*, at 10.

submissions with 14 days of the statutory deadline for Commission action on a forbearance petition; and (3) require the Commission to issue a written order seven days after the close of the statutory period.[19] Qwest likewise finds some rules proposals acceptable. Qwest does not object to the Commission issuing protective orders within 21 days of the filing of a forbearance petition nor does it oppose a rule requiring the submitting party to make available documents required by a protective order in a searchable electronic format.[20]

### B. The Proposed Rules Would Create A Clear Procedural Roadmap That Would Apply Equally To All Interested Parties

The specific proposals contained in the Rules Petition (and incorporated in the NPRM) are a reasonable attempt to establish impartial rules to govern the conduct of Section 10 forbearance proceedings. They would enable all interested stakeholders (petitioners and affected parties alike) to have a full and fair opportunity to present their views to the Commission and the Commission to make a fully informed decision. Some commenters have offered constructive suggestions that would improve several of the original proposals and those suggestions should be embraced by the Commission.

Given the petitioners' intent to address the *ad hoc* nature of the forbearance process in a manner that would apply equally to all potential forbearance petitioners and interested parties, it is difficult to imagine why the notion of procedural rules should provoke resistance among any commenting parties. Not only do the proposed rules seek clarity, they intend to reduce the time, energy, and resources that *all* stakeholders expend in an ambiguous, rule-free environment. Therefore, the vehemence with which some commenters oppose the

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19 Comments of AT&T Corp., WC Docket No. 07-267 (filed Mar. 7, 2008) ("*AT&T Comments*"), at 16, 20.

20 Comments of Qwest Communications International, Inc., WC Docket No. 07-267 (filed Mar. 7, 2008) ("*Qwest Comments*"), at 17.

adoption of procedural rules, notwithstanding their impartial application to all parties, is troublesome.

Strenuous opposition to the adoption of uniform procedural rules applicable to all parties by some commenters suggests that those commenters derive a significant competitive advantage from the Commission's current disjointed course that they are loathe to give up. This lends weight to Time Warner's suggestion that some petitioners may be "artificially skewing the Commission's jurisprudence in favor of forbearance grants."[21] The Commission should reject the views of those commenters that seek merely to retain their ability to manipulate the forbearance process through continuation of the current free-for-all environment and focus instead on those constructive suggestions that would lead to the conduct of forbearance proceedings in the fairest and most efficient manner possible.

## III. EACH OF THE CATEGORIES OF RULES PROPOSED IN THE NPRM SHOULD BE ADOPTED BY THE COMMISSION

### A. The Complete-As-Filed Rule Ensures that Essential Data Has Been Filed with the Forbearance Petition Without Foreclosing the Production of New Information

The NPRM seeks comment on whether the Commission should adopt a complete-as-filed rule, which would require the petitioner in its initial filing to submit all evidence upon which it would have the Commission rely in evaluating whether the statutory requirements of Section 10 have been met.[22] AT&T opposes adoption of a complete-as-filed obligation, complaining that the complete-as-filed standard is an "extreme measure" that would "prohibit petitioners (but not others) from providing the Commission with relevant, updated market

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21 *Time Warner Comments*, at 2.

22 *NPRM*, at ¶ 6.

information bearing on the original request for forbearance."[23] AT&T further contends that the rule would "silenc[e] the petitioner following the filing of its petition or, in the alternative, staving off forbearance by turning routine filings into triggers for restarting the clock."[24] These allegations are wholly without merit.

The purpose of the complete-as-filed rule is not to bar the petitioner from submitting relevant data. The rule's purpose, rather, is to prevent the filing of premature forbearance petitions or the withholding of critical information until after the comment cycle, thereby foreclosing any opportunity for meaningful review and response by interested parties and denial to the Commission of timely access to critical data and analysis. Under the existing process, as NARUC notes, "a petitioning party could submit no real evidence with its initial petition and undermine the FCC's procedures by manipulating the 12-month statutory clock."[25] Thus, a complete-as-filed rule would eliminate any potential gaming of the system by a petitioning party. Moreover, the complete-as-filed rule would return control of the forbearance process to the Commission and "protect the integrity of the FCC process,"[26] while preserving the petitioner's right to supplement the petition. Under a complete-as-filed rule, updated information and data not available at the time the petition is filed may be filed by the petitioner after the petition has been docketed.

Indeed, Chairman Martin has cited the importance of a complete-as-filed rule in the context of Section 271 proceedings as a safeguard for meaningful comment and a shield against untimely data submissions:

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23 *AT&T Comments*, at 13.

24 *Id.*

25 *NARUC Comments*, at 5.

26 *Id.*

> The Commission should avoid relying on late-filed information. We have continued to take such information into account with greater frequency, and I fear that we may be moving in the wrong direction. In particular, I am concerned that relying on this information may burden commenters—particularly those opposing an application. Commenters need adequate time to evaluate and analyze new information, especially if it affects significant aspects of an application. When we accept late-filed information, we create additional burdens for them.[27]

The Chairman further noted that the Commission is better served "by emphasizing the importance of having all of an applicant's supporting information in the record when the application is filed ..."[28]

At its heart, a complete-as-filed requirement would help ensure due process for parties affected by the petitioner's request for forbearance. In the context of Section 10 forbearance proceedings, the Commission should not consider any individual party's deregulation request without implementing sufficient procedures to ensure that the Commission's ultimate action is fundamentally fair to all potentially affected parties. This is of particular importance when interested parties stand to lose fundamental rights and protections under the Act such as those contained in Sections 251 and 271.[29]

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27 *See* Statement of Commissioner Kevin J. Martin, *Application by Verizon Virginia Inc., Verizon Long Distance Virginia Inc., Virginia Enterprise Solutions Virginia Inc., Verizon Global Networks Inc. and Verizon Select Services of Virginia Inc., for Authorization to Provide In-Region, InterLATA Services in Virginia*, WC Docket No. 02-214, 17 FCC Rcd at 21925 (Oct. 30, 2002) ("*Verizon Virginia Application*") (noting concern where the Commission waived the complete-as-filed requirement twice and relied on data filed by the applicant well after the comment period).

28 *Id.*

29 The Commission has the authority to waive the complete-as-filed rule if there is good cause to do so. The Commission has waived the complete-as-filed requirement in certain circumstances, including the Section 271 interLATA entry proceeding for Virginia filed by Verizon. There, the Commission waived the complete-as-filed requirement on its own motion in response to comments that Verizon's application was not complete when filed because Verizon had not memorialized its interconnection agreements prior to the filing of its Section 271 application. *Id.*

Finally, a complete-as-filed rule would help ensure the most efficient use of Commission resources. The Commission should not be expected to expend valuable staff resources on an incomplete case nor should the petitioning party be rewarded by having the statutory clock begin to run on a petition that is filed without any supporting data or evidence. A complete-as-filed rule is hardly an "extreme measure."[30] The Commission's current formal complaint rules similarly include a complete-as-filed requirement wherein complainants are obligated to file an entire case before any Commission resources will be expended on analyzing a complaint. Incomplete formal complaints are dismissed. Thus, in the interest of the efficiency of Commission resources and the public interest, a complete-as-filed rule should be adopted here as well.

### B. The Commission Has Authority To Apply APA Procedures to the Forbearance Process

Qwest asserts that the Commission "makes policy in forbearance proceedings" and that the adoption of procedural rules would "essentially convert forbearance into adjudicatory rather than policy-making activity."[31] Qwest argues that "whenever it engages in policy-making, the Commission must negotiate issues like the need for up-to-date data and the input of third-parties, midstream developments in the law through other proceedings, pending appeals, last-minute ex parte filings, etc." Since the Commission has addressed these issues without adopting procedural rules in the context of other "policy-making" proceedings, Qwest asserts that procedural rules are unnecessary for forbearance "policymaking."[32] Qwest's

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30 *AT&T Comments*, at 13.

31 *Qwest Comments*, at 3, 11.

32 *Id.*

assertion that forbearance proceedings are considered policymaking activities, however, is demonstrably false.[33]

There is no question that certain parties have been employing Section 10 as a means to prompt the Commission to decide matters better suited for a rulemaking, declaratory ruling, or a clarification proceeding.[34] Yet Congress did not intend for Section 10 forbearance to serve as a surrogate for Commission "policymaking." As members of Congress have made clear: "It was understood that this [Section 10] would be judiciously used to address acute problems—it should not be used to remove administrative laws processes and protections.[35]

The issue of whether forbearance proceedings are policymaking activities more akin to rulemakings than adjudications, as some commenters claim, is immaterial to establishing the Commission's authority to apply administrative rules to Section 10 proceedings.[36] When Congress enacts "skeletal legislation," such as the Section 10 provision, it is "meant to be amplified by executive regulations."[37] Section 551(4) notes that agency rules are "designed to implement, interpret or prescribe law ...."[38] And, as the Rules Petition explained, the primary purpose of APA rules is to "ensure that agencies afford all parties with due process and to

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33 AT&T agrees, noting that "forbearance proceedings are *adjudications*, not rulemakings." *AT&T Comments*, at 18 (emphasis in original).

34 *See, e.g., COMPTEL Comments*, at 3.

35 Letter of Sens. Byron L. Dorgan, Daniel K. Inouye, John F. Kerry, John D. Rockefeller IV, Ron Wyden, Amy Klobuchar, to the Hon. Kevin J. Martin, Chairman, Federal Communications Commission (Nov. 20, 2007) (at least two of the letter's signers, Inouye and Kerry, participated in floor debates where the purpose of Section 10 was discussed.)

36 *See, e.g., Rules Petition*, at 8 (noting that "forbearance petitions are not clearly rulemakings or adjudications that automatically fall under the procedural requirements of the APA... So far, the Commission has typically treated forbearance petitions consistent with the APA's notice-and-comment procedures and the ex parte rules that govern rulemaking dockets.")

37 *Final Report of the Attorney General's Committee on Administrative Procedure,* Chapter VII(I)(B) (Senate Document No. 8, 77th Congress, First Session, 1941) (Attorney General's Report").

38 5 U.S.C. 551(4).

guarantee that agencies develop and implement well-defined, uniform standards in adjudication and rulemaking proceedings."[39] Given the "skeletal" nature of Section 10, the Commission should step in and provide certainty regarding what it will require of any forbearance petition.

### C. The Commission Has The Authority, and the Obligation, To Issue Written Orders In All Forbearance Proceedings

AT&T, Verizon, and Qwest assert that it is unlawful for the Commission to issue a written order after a petition has been "deemed granted" by operation of law. They point to the recent D.C. Circuit ruling in *Sprint Nextel Corp. v. FCC* as support for their position.[40] The RBOCs' interpretation of that decision is clearly incorrect.

The "deemed grant" of a forbearance petition does not preclude or limit the subsequent issuance of an official order addressing the merits of the petition. Section 10 does not speak to the Commission's jurisdiction to issue a written commemoration of its actions after the statutory deadline for ruling on a forbearance petition has passed, but the principle that the Commission may issue a written decision following the statutory deadline has been well established judicially.[41] Commission precedent also acknowledges that failure to issue a formal written order by a statutory deadline does not preclude it from reexamining a forbearance petition in response to a petition for reconsideration.[42]

The D.C. Circuit's recent decision in *Sprint Nextel* does not hold otherwise. There, the Court was presented with a situation where a deadlocked 2-2 vote on Verizon's broadband forbearance petition failed to result in a written Commission order by expiration of the statutory deadline. Thus, Verizon's petition was deemed granted by operation of law. In its

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39 *Rules Petition*, at 12 (citing *Attorney General's Report)*.

40 *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) ("*Sprint Nextel*").

41 *Qwest Corp. v. FCC*, 482 F.3d 471, 477 (D.C. Cir. 2007).

42 *Id. See also Core Communications, Inc. v. FCC*, 455 F.3d 267 (D.C. Cir. 2006), Brief for Respondents, at 31-33.

decision, the Court solely addressed the issue of whether a deemed grant pursuant to Section 10(c) is subject to judicial review. The Court did not rule on the Commission's ongoing authority to issue a written order addressing the merits of Verizon's broadband forbearance petition after the statutory deadline has passed.

At a minimum, the Commission should establish voting rules for forbearance proceedings to ensure that a forbearance petition results in certain administrative action, as Time Warner recommends.[43] To that end, the Commission should interpret the term "deny" as provided in Section 10 to include a tie vote by the Commission, thereby constituting a denial of the subject petition. By clarifying the meaning of denial, the Commission is certain to avoid the harm to stakeholders that would result if the Commission instead refrained from any administrative action in a tie situation. Clarifying the scope of "denial" in the context of Section 10 forbearance petitions in this manner would permit the Commission to issue a written order explaining its action, thereby lending greater clarity and certainty to the forbearance process.

### D. The Commission Should Promote Data Collection From All Parties While Retaining the Burden of Proof and the Burden of Adducing Evidence on the Petitioner

Verizon encourages the Commission to adopt a rule requiring data collection from third parties for which petitioners would otherwise lack access.[44] The Joint Commenters endorse the Commission's collection of readily-available third-party data within reason, and so long as the Commission seeks the production of such data well before the statutory deadline for Commission action on a forbearance request. This practice would support the development of a

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43 *Time Warner Comments*, at 27.

44 Comments of Verizon and Verizon Wireless, WC Docket No. 07-267 (filed Mar. 7, 2008) ("*Verizon Comments*"), at 15.

complete record as early in the proceeding as possible. It is frustrating for *all* stakeholders when relevant data from third parties is not submitted until well into the 12-month process.

While the Joint Commenters support the timely collection of data from third parties, Verizon's proposal that the Commission gather the relevant data "no later than the time comments are due"[45] would prove challenging. In many cases, the parties providing data are likely to be parties commenting in the proceeding. A party may be hard-pressed to provide meaningful comments and market data at the same time. Instead, the Commission should adopt a more flexible rule for the submission of data from third parties. While a more relaxed data production timeframe is recommended, the Joint Commenters urge the Commission to collect such data well before the statutory deadline in order to ensure a full opportunity for review and comment by interested parties and analysis by the Commission.

Finally, while the Joint Commenters recognize that third parties may be in possession of data that is useful to the Commission in determining whether forbearance is warranted, the Commission's collection of data from third parties should in no way be viewed as relieving the petitioning party from its burden of proof or its obligation to produce evidence to support a *prima facie* case that the requirements of Section 10 have been met. As Time Warner correctly notes, cable operators have provided relevant data to the Commission in proceedings where forbearance from Section 251(c)(3) unbundling obligations has been sought, but the cable companies' data production in no way relieved the petitioner of its burden of proof in satisfying the Section 10 standard.[46]

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45 *Id.*

46 *Time Warner Comments*, at 24.

### E. The Commission Should Build Exceptions Into a Standard Comment Cycle

The NPRM asks for comment on whether the Commission should adopt a standard comment cycle for all Section 10 forbearance petitions.[47] Under the plan suggested in the Rules Petition, the comment cycle would start once the Commission has completed initial review of the petition (and the petitioning party has cured any non-material procedural defects) and after affected states have provided input. At that time, interested parties would be afforded 45 days to file comments. Reply comments would be due 30 days following submission of initial comments.[48]

In opposing the adoption of a standard comment cycle for forbearance petitions, Verizon and Qwest each provide the same example of a situation in which a standard comment cycle may not have been necessary.[49] In that case, Qwest re-filed a petition virtually identical to its original request on which the Commission already had provided notice and sought comments.[50] The Commission docketed the petition in the same docket as Qwest's original petition, so that all prior pleadings and *ex partes* were made part of the record on the re-filed petition. In addition, the prior petition had been on file with the Commission for 15 months, had been fully vetted during that time period, and was identical in substance to petitions previously filed by several other ILECs and ruled on by the Commission.[51]

The Joint Commenters agree that unique circumstances may obviate the need for a standard comment cycle. This is not a legitimate reason, however, for the Commission to refrain from adopting a standard comment cycle rule that would apply in non-extraordinary cases

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47 *NPRM*, at ¶¶ 3, 9.

48 *Rules Petition*, at 27.

49 *Verizon Comments*, at 26; *Qwest Comments*, at 12.

50 *Verizon Comments*, at 26.

51 *Qwest Comments*, at 13.

however. A more appropriate way to treat the type of situation Verizon and Qwest highlight is for the Commission to ensure that its standard comment cycle rule provides for exceptions in extraordinary situations. By allowing for exceptions to a standard comment cycle rule, the Commission could properly conserve resources and avoid duplicative review.

### F. The Record and Commission Precedent Confirm that the Petitioner Must Bear the Burden of Proof

Verizon asserts that the proposed rule requiring forbearance petitioners to plead with particularity or risk dismissal for failing to satisfy the three-prong test in Section 10(a) is "imprudent."[52] Verizon contends that such a rule "improperly presumes that forbearance petitioners will always possess the information necessary for the Commission to grant a petition."[53] Similarly, AT&T claims that it is the Commission's burden, rather than the petitioner's to "justify the continuation of the regulation at issue."[54]

Taken to its extreme, application of the burden of proof suggested by Verizon and AT&T would permit a petitioner to do nothing more than simply request forbearance in its petition. The burden would then shift to the Commission to compile all evidence from all affected parties and demonstrate whether the Section 10 criteria have or have not been satisfied. At best, this is an absurd outcome.

Verizon and AT&T willfully misapply the burden of proof and ignore Commission precedent on this point. The Commission has held that those asking it to exercise its forbearance authority must establish "with specificity why [they] should receive relief."[55]

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52 *Verizon Comments*, at 33.

53 *Id.*, at 34.

54 *AT&T Comments*, at 14.

55 *See, e.g., Petition for Forbearance from E911 Accuracy Standards Imposed on Tier III Carriers For Locating Wireless Subscribers Under Rule Section 20.18(H)*, 18 FCC Rcd 24648, 24653 (2003).

Despite these holdings, several commenters point out that the Commission has never explicitly stated that forbearance petitioners have the burden of proof.[56] The Joint Commenters urge the Commission to put an end to any confusion on this point by expressly stating that petitioners have the burden of proof to present a *prima facie* case that each of the elements contained in Section 10 have been met.

## IV. THE COMMISSION SHOULD ENSURE THAT REFORMS TO THE FORBEARANCE PROCESS DO NOT STRAY FROM CONGRESS' INTENT TO PROMOTE COMPETITION AND PROTECT THE PUBLIC

Not all of the rules suggested in the initial comments would reform the Section 10 process in a positive manner. Because they would not further the goal of an impartial forbearance process that leads to fully-informed decisions by the Commission, they should be rejected by the Commission.

In particular, Verizon proposes that the Commission rule on the merits of all future forbearance petitions within six months of the date they are filed and extend the deadline for consideration only in extraordinary circumstances.[57] Although the Joint Commenters believe that the Commission should act as expeditiously as possible in considering requests for forbearance under Section 10, a compulsory six-month deadline is untenable for several reasons and represents another attempt by certain parties to dictate the use to which Commission resources are put. First, the Commission's consideration of forbearance petitions already is subject to a 12-month statutory deadline and if it fails to act by that deadline, a petition is deemed granted by operation of law.[58] Thus, there is no justification for a fear that the

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56 *See, e.g., Earthlink Comments*, at 9.

57 *Verizon Comments*, at 12.

58 Section 10(c) permits the Commission to extend that deadline an additional 90 days. 47 U.S.C. § 160(c).

Commission will "sit on" a forbearance request, thereby denying a petitioner the deregulation it may deserve.

Second, petitions seeking forbearance from fundamental pro-competitive rules and statutory provisions are inherently complex, far-reaching in their impact, and deserving of thoughtful deliberation.[59] Forbearance requests often demand analysis of market-specific empirical data that is detailed and complicated. Time Warner, for example, cites the recently completed Verizon 6-MSA forbearance proceeding, in which Verizon's reply comments alone contained 11 exhibits totaling more than 500 pages.[60] Not only were those reply comments difficult to review, they were difficult to access.[61] The Commission took the full 15-month statutory period to dispose of Verizon's petitions in that complex docket and it strains credulity to suggest that the Commission could have completed its analysis and rendered its ruling within six months.

Deregulation of the kind contemplated in Section 10 (and other provisions of the Act) is "always a gradual, transitional process," Commerce Committee Chairman Larry Pressler said during Senate floor debates on the measure.[62] Yet Verizon would halve the Commission's 12-month timeframe for consideration of forbearance requests, a practice that would deprive interested parties of much-needed time to present their views to the Commission and, most importantly, would rob the Commission of a meaningful opportunity to consider the record.

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59 *Rules Petition*, at 10.

60 *Time Warner Comments*, at 10 (citing *ACN et al. Motion to Dismiss Or, In the Alternative, To Deny Petitions for Forbearance on the Basis of Late-Filed Data*, WC Docket No. 06-172, at 5 n. 9-10 (May 22, 2007).

61 Verizon's reply comments were not made publicly available on the Commission's Electronic Comment Filing System ("ECFS") until three weeks after they were filed.

62 Congressional Record, S7889 (Jun. 7, 1995).

Given Verizon's ardent endorsement of a six-month timetable for consideration of forbearance petitions, it is surprising that it does not support the adoption of a complete-as-filed rule. By ensuring that the Commission receives all information material to the petitioner's forbearance request in its initial filing, the complete-as-filed rule would provide the Commission "the evidence it needs" for weighing a forbearance request in a timely fashion—which Verizon claims is the intent of its proposed six-month rule.[63] And assuming the Commission receives all the empirical evidence it requires to consider a forbearance request in the petition (or soon thereafter) and all parties have had a meaningful opportunity to comment, there is no requirement that the Commission take the full statutory period to reach its decision.

The Commission also should reject Qwest's objection to the proposal to allow Confidential and Highly Confidential materials submitted in one forbearance proceeding to be used by authorized persons in related forbearance proceedings. Qwest notes that there may be reasons to avoid such requirements, but there are better reasons to adopt the proposal.[64] For one, the Commission has long recognized the need to "develop a complete record on which to base [its] decision[s]" and the duty to "protect the rights of the public to participate ... in a meaningful way" in Commission dockets.[65] Adoption of the proposed rule would further these important

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63 *Verizon Comments*, at 26. Contrary to the Verizon claims, the complete-as-filed requirement as applied to Section 271 proceedings *does* require an applicant to include in its petition all probative evidence that the Commission would consider in its ruling. *Id.*, at 29. A BOC seeking authority to provide in-region interLATA service under Section 271 was required to submit in its application "all of the factual evidence upon which [it] would have the Commission rely in making its findings." *Rules Petition*, at 14 (citing *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 16 FCC Rcd 6923, 6925 (2001).

64 *Qwest Comments*, at 17.

65 *See, e.g., Petition for Cingular Wireless, LLC for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Order, 22 FCC Rcd 2457 (Feb. 8, 2007) (in granting Embarq's request to review and comment on information in Cingular's Five-Year Service Improvement Plan, the Commission noted that "only by providing parties with the ability to fully comment on the Cingular Petition in its entirety

principles. In addition, permitting authorized persons to use Confidential and Highly Confidential information in related cases may assist in determining whether a party is unfairly withholding or altering market data or information in a particular case. Finally, the Commission and interested parties could avoid the often substantial costs associated with extensive reexamination of data.[66]

The Commission also should reject Qwest's objection to eliminating from the Commission's standard protective orders a provision that prohibits copying for certain Highly Confidential information. There is evidence that, contrary to Qwest's objection, such a rule is necessary and in the public interest. As Earthlink notes, "by prohibiting copying, a party can limit opponents' ability to review and use the information.[67] Qwest's objection to eliminating the copying prohibition is at odds with the Commission's intended purpose in adopting a model protective order "to reduce the need for lengthy negotiations or litigation over the terms of such orders and help prevent delays in proceedings."[68]

## V. CONCLUSION

The Commission should be commended for initiating this NPRM. The initial comments in this proceeding demonstrate overwhelming support for the adoption of clearly defined practices and procedures governing the consideration of forbearance petitions. The

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will we develop the complete record necessary to fully analyze the merits of the Petition.").

66 The courts have found good cause to permit the use of confidential materials in related cases. *See, e.g., Cipollone v. Liggett Group, Inc.*, 822 F.2d 335, 337 (3rd Cir.), *cert. denied*, 479 U.S. 1043 (1987) (in a supplemental opinion, the court required a protective order to be modified to permit the use of confidential internal tobacco company documents in future litigation); *See also* Note, After Cipollone v. Liggett Group, Inc., 38 Am. U. L. Rev. 1021, 1048 (1989) (citing the well-documented practice of using confidential information under protective order in related proceedings in product liability cases.).

67 *Earthlink Comments*, at 17.

68 *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Order, 13 FCC Rcd 24816 (1998).

Commission therefore should immediately adopt the procedural rules contained in its NPRM as supplemented by the constructive recommendations provided in these reply comments and by others.

Respectfully submitted,

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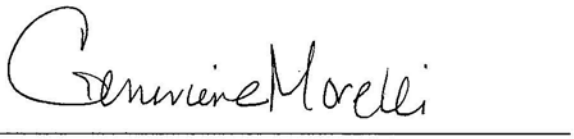
By: 

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